

James William Hubel
Debtor
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Re.: James William Hubel
Chapter 7
Case No. 08-10396

LETTER DECISION AND ORDER

James William Hubel (the “Debtor”) is a prisoner under the jurisdiction of the New York State Department of Corrections, and he currently resides at the Hudson Correctional Facility. The Debtor has been incarcerated since December 2002, and is scheduled for release in November 2008 (conditional). The Debtor filed *pro se* a voluntary petition for relief under chapter 7 of the Bankruptcy Code on February 15, 2008. This is the Debtor’s fourth filing in the Northern District of New York. The Debtor filed a joint chapter 7 petition with Debra A. Hubel on November 7, 1991 (Case No. 91-14430) and received a discharge on February 20, 1992. The Debtor and Debra A. Hubel filed a second joint chapter 7 petition on July 15, 1999 (Case No. 99-

14223) and received a discharge on December 2, 1999. The Debtor filed a chapter 7 petition on October 24, 2005 (Case No. 05-20260), which was stricken due to the Debtor's failure to obtain the pre-petition credit counseling required under 11 U.S.C. § 109(h).¹ *In re Hubel*, No. 05-20260 (Bankr. N.D.N.Y. Jan. 3, 2006), *aff'd* ., No. 1:06-CV-361, 2007 W.L. 3033936 (N.D.N.Y. Oct. 12, 2007).

With his current petition, the Debtor filed an application requesting permission to proceed *in forma pauperis*, which the court granted by order entered February 19, 2008. The Debtor did not complete the required pre-petition credit counseling course before filing his petition. Instead, the Debtor filed with his petition an application for exemption from the required credit counseling pursuant to § 109(h)(3)(A)(ii) and (4). In his affidavit in support of his application, the Debtor indicated that in preparing to file for bankruptcy protection, he requested and received from the Office of the United States Trustee for the Northern District of New York and Vermont a list of 18 credit counseling agencies approved by the Office of the United States Trustee in this district. The Debtor communicated with all 18, but received only three responses. Of the three agencies that responded, only one agency, C.C.C.S. of Buffalo, Inc. ("C.C.C.S."), agreed to waive its fee based upon the Debtor's circumstances. C.C.C.S. offers its credit counseling in person, over the Internet and over the telephone. C.C.C.S. does not offer its credit counseling through written correspondence. The Debtor's incarceration prohibits him from physically attending a credit counseling course. The Debtor also lacks access to the Internet. The Debtor's request for permission to communicate with C.C.C.S. by telephone was denied by the Hudson Correctional

¹Unless otherwise noted, all statutory references are to the Bankruptcy Code, §§ 101-1532, as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, effective October 17, 2005.

Facility as the call was not found to be an emergency. Further, the Debtor may only make collect calls, and he is prohibited from making collect calls to toll free numbers, and calls to order services from private vendors or to conduct business related activities. Based on the foregoing, the Debtor asserts he should be considered incapacitated or disabled as defined in § 109(h)(4) and, therefore, a permanent waiver of the credit counseling requirement should be granted.

One of the additions to the Bankruptcy Code resulting from the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 is that an individual may not be a debtor in a bankruptcy case unless that individual has received pre-bankruptcy credit counseling from an approved nonprofit agency. More specifically, § 109(h)(1) provides

Subject to paragraphs (2) and (3), and notwithstanding any other provision of this section, an individual may not be a debtor under this title unless such individual has, during the 180-day period preceding the date of filing of the petition by such individual, received from an approved nonprofit budget and credit counseling agency described in section 111(a) an individual or group briefing (including a briefing conducted by telephone or on the Internet) that outlined the opportunities for available credit counseling and assisted such individual in performing a related budget analysis.

11 U.S.C. § 109(h)(1). Section 521(b) requires a debtor to file with his petition a certificate from the approved agency that provided the services, along with a copy of any debt repayment plan developed through the agency. Under very limited circumstances, upon motion, the pre-petition credit counseling requirement may be waived if: (1) the debtor lives in a district where the United States Trustee or bankruptcy administrator determines that the nonprofit agencies are not reasonably able to provide adequate services (§ 109(h)(2)); or (2) the court determines the debtor is unable to complete credit counseling because of incapacity, disability, or active military duty in a military combat zone (11 U.S.C. § 109(h)(4)). For purposes of § 109(h)(4),

[I]ncapacity means that the debtor is impaired by reason of mental illness or mental deficiency so that he is incapable of realizing and making rational decisions with respect to his financial responsibilities; and ‘disability’ means that the debtor is so physically impaired as to be unable, after reasonable effort, to participate in an in person, telephone, or Internet briefing. . . .

Id.

Alternatively, a debtor may seek an extension of time to comply with pre-petition credit counseling requirement by filing with the petition a certification, to the satisfaction of the court, that describes exigent circumstances and the debtor’s inability to obtain credit counseling during the 5-day period beginning the date on which the debtor made the request. 11 U.S.C.

§ 109(h)(3)(A). Although the Debtor’s application seeks relief under § 109(h)(3)(A) and (4), the court does not find the Debtor’s incarceration alone warrants a finding of exigent circumstances. Nor does the court find the Debtor’s desire to organize his finances prior to his release date, sufficient to find exigent circumstances surrounding the Debtor’s filing. In addition, the Debtor has not certified that he requested credit counseling from an approved agency but was unable to obtain the services during the five day period beginning on the date on which he made that request. Even if the court were to grant the Debtor a temporary waiver under § 109(h)(3)(A), pursuant to § 109(h)(3)(B), the court may defer the credit counseling requirement for a period of 30 days and, for cause, an additional 15 days from the date of the filing of the bankruptcy petition, which would be of no assistance to the Debtor given his on-going inability to obtain credit counseling. Thus, any request by the Debtor for a temporary waiver of the credit counseling requirement pursuant to § 109(h)(3)(A) is denied.

With respect to the Debtor’s request for a permanent waiver of the credit counseling requirement under § 109(h)(4), the Debtor is not in the military; thus, the court must make a

determination that the Debtor is either disabled or incapacitated. Incapacity under § 109(h)(4) refers to a mental illness or mental deficiency. Neither is asserted by the Debtor. That narrows the issue before the court to whether the Debtor's incarceration is a basis to find that he is disabled such that he is "so physically impaired as to be unable, after reasonable effort, to participate in an in person, telephone, or Internet briefing." 11 U.S.C. 109(h)(4).

This same issue was addressed by the court in *In re Rendler*, 368 B.R. 1 (Bankr. Minn. 2007). In that case too, the debtor was incarcerated and unable to leave prison to obtain an in-person briefing, and he was denied access to a telephone and the Internet. Judge Kishel noted that § 109(h) provides, in clear language, three very narrow grounds to override the pre-petition credit counseling requirement, none of which apply to incarceration. *Id.* at 2.

The legislation is clear on its face. It simply does not permit a debtor to be absolved of the statute's compliance requirements where, for instance, credit counseling services on an in-person basis are unavailable locally to the debtor; or where participating in counseling imposes personal inconvenience on the debtor in some other way; or really, on the grounds of any other consideration that stems from a debtor's personal circumstances, no matter how extreme.

Id. at 2-3. As a result, the court denied the debtor's request for exemption from credit counseling.

Although the Debtor argues he is physically prevented from participating in credit counseling, the court finds his incarceration does not constitute a "physical impairment" as intended by Congress. The court agrees with the rationale of *In re Rendler*; the statute contemplates an impairment due to physical disability, as opposed to one's personal circumstances. The Debtor's circumstances simply do not fall within the narrow exceptions established by Congress. The court recognizes that the Debtor effectively has no way to comply with § 109(h), but any expansion to the exceptions must come from Congress and not the court.

Based on the foregoing, the Debtor's motion is DENIED.

It is SO ORDERED.

Dated: 3/7/08

/s/ Robert E. Littlefield, Jr.

Hon. Robert E. Littlefield, Jr.
U.S. Bankruptcy Judge